Filed 9/26/14 Nieves v. City of Los Angeles CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ORLANDO NIEVES, Plaintiff and Respondent, v. CITY OF LOS ANGELES et al., Defendants and Appellants.	B246981 (Los Angeles County Super. Ct. No. BS130893)

APPEAL from a judgment of the Superior Court of Los Angeles County, Luis A. Lavin, Judge. Affirmed.

Michael N. Feuer, City Attorney, Gregory P. Orland, Managing Deputy City Attorney, and Brian I. Cheng, Deputy City Attorney, for Defendants and Appellants.

Gary O. Ingemunson for Plaintiff and Respondent.

Police Officer Orlando Nieves was found guilty of misconduct by the City of Los Angeles Police Department's Board of Rights (Board) in connection with a 2007 MacArthur Park May Day demonstration. The Board concluded, among other things, that Nieves "provided misleading statements during an official Department investigation, pertaining to the identity of a fellow" police officer involved in the demonstration. The misleading statements were alleged to have been made during an Internal Affairs interview of Nieves two months after the demonstration, at which Nieves was shown video clips and freeze frames of particular shots depicting events that occurred in the park on May Day. He was asked to identify an officer shown in the clips and said he could not. The Board determined his statement that he could not identify the other officer was not credible because he could have identified the officer based on what he saw in the clips and freeze frames during the Internal Affairs interview. Alternatively, the Board concluded he would have remembered the events depicted, including the identity of the officer, at the time of the Internal Affairs interview and could have identified the officer by relying on his memory.

Nieves petitioned the superior court for a peremptory writ of mandate. Following a court trial and review of the record, the court granted the writ and entered judgment for Nieves, disagreeing with the Board's conclusions, including its determination that Nieves lacked credibility. The City of Los Angeles (City) filed this timely appeal, contending the court did not give the Board's determination that Nieves lacked credibility the strong presumption of correctness to which it is legally entitled. The City's argument boils down to the contention that, because the court disagreed with the Board's credibility call and the court's written rationale was short, the court must not have given the Board's decision the required degree of deference. We disagree and affirm.

BACKGROUND

Nieves is a long-time veteran of the Los Angeles Police Department (LAPD). On May 1, 2007, he had been assigned to the Metropolitan Division of the LAPD for almost 10 years. On that date, his platoon was assigned to disperse a crowd of thousands of people demonstrating violently in MacArthur Park.

Roughly 100 officers waded into the melee. The officers were dressed almost identically, faces and heads shielded by visors and helmets, although, as is discussed below, certain officers were visually distinguishable because they wore or carried identifiable accoutrements. Most of the officers had their last names written on the backs of their clothing as well as serial numbers painted onto the sides of their helmets.

Nieves's platoon formed an east/west "skirmish line" across the park to drive the mass of demonstrators northward out of the park. Nieves served as a "linebacker," following behind the skirmish line, charged with scanning the area in front of the officers on the line, trying to identify individuals launching dangerous projectiles from ahead of the line so he could order the officers carrying weapons used for firing bean bags and the like to focus on them. He also was responsible for keeping the line orderly and moving forward, dealing with obstacles to that effort, determining if anyone was hurt, commanding the movement of the line, coordinating and communicating with other linebackers by hand signals and radio, all whilst dodging rocks and bottles. That day, a given linebacker might be responsible for "working 15 guys back and forth to make sure that they hear the commands, that they know that they're not experiencing any tunnel vision or anything, and they're—they're not, you know, in line maintaining integrity with each other, and relaying commands, 'Hold. Hold. Hold. Okay. Start. Let's go. Move it out.'" There were no fixed positions assigned to particular officers from left to right along the skirmish line. The officers' positions were constantly changing. As the area they needed to cover widened and narrowed, there was an "accordion effect" where the line bent back onto itself, doubled in depth, and officers' positions were scrambled.

Nieves later stated it was difficult to determine what officers were in front of him because "everyone's wearing a vest and they—I mean, you just—I mean, you're so focused on what's going in front of you—as a linebacker, I just got to make sure that line's moving and the integrity of the line is—is there. No one's hurt. Everyone's moving. You know, as a team. [¶] . . . [Another linebacker] and I are communicating . . . ."

There was "a lot of chaos . . . incoming projectiles, rocks, bottles, sticks, bottles of frozen water, and/or other debris, fruit, food, hot dogs . . . ." "The crowd was densely packed." The officers "heard a lot of people screaming and yelling, a lot of officers." The crowd was "very aggressive." Crowd members, including people in masks, would stop, pull projectiles out of backpacks, and throw them. Officers were on the radio requesting reinforcement, saying, "[W]e're getting killed over here. Our guys are getting hit hard. We're getting hurt."

During his time in the park, Nieves was involved personally in three separate uses of force. Seconds before the incident that was the subject of the eventual inquiry, Nieves was hit with a frozen water bottle on the elbow, which numbed his hand.

On June 26, 2007, Nieves, with his attorney present, was interviewed by Lieutenant Palazzolo and Sergeant Baeza of Internal Affairs Group. Palazzolo spent a great deal of time studying as many as 50 videotapes frame by frame and ultimately conducting 50 interviews, attempting to determine the identities of certain officers and trace them to the scenes of certain uses of force.

Nieves was shown three video clips of the May 1, 2007 demonstration identified as "Number 6. Coogan and Stein." The Internal Affairs investigators paused the video on a single frame or frames to assist Nieves to respond to their questions. Although Palazzolo's testimony at the Board of Rights hearing came about two years after Nieves's Internal Affairs interview and no one kept a record of what single frame or frames were on the screen when Nieves failed to identify Officer Mark Blizzard, Palazzolo testified he could remember which frame was shown when Nieves said he could not identify the officer.

The transcript of the Internal Affairs interview demonstrates Nieves readily identified himself in the "Number 6. Coogan and Stein" clips and recalled one of the events depicted, when television newscaster Mark Coogan was knocked to the ground by another officer. Nieves remembered what was depicted on the video clip he was being shown, telling the investigators he had stopped next to the downed Coogan to ask if he was okay and tell him, "You need to get out of here." Seconds after Nieves's videotaped

interchange with Coogan and close by, Officer Blizzard admits to having knocked Coogan's cameraman, Stein, to the ground. The City claims this act is shown on one of the video clips included in "Number 6. Coogan and Stein." Even paused, the video depicts fast-moving men swarming toward the camera, dressed almost identically, behind visors sometimes glaring in the sun. It is very difficult to make out what is happening.

Among other things, the Internal Affairs investigators asked Nieves if he could identify Blizzard from three video clips grouped together and titled "Number 6. Coogan and Stein." When one of the clips is shown in freeze frame, it shows an officer wearing sunglasses under his visor walking next to an officer whose visor is raised partially. The City contends the officer with sunglasses is identifiable as Nieves and the one whose visor is raised partially is identifiable as Blizzard. This freeze frame shot appears to occur within seconds of a shot that seems to show two officers with a large rectangular object, possibly a video camera, at hip level in front of them. The City contends this clip also shows Nieves and Blizzard, with Blizzard knocking the cameraman to the ground. Blizzard is not the only officer in the "Number 6. Coogan and Stein" clips with his visor partly raised, and his name and helmet serial number do not appear in that set of clips.

The following answers to the investigators' questions about "Number 6. Coogan and Stein" are the bases of the allegation that Nieves made misleading statements. The record contains nothing to identify what shot was on the screen at the time of each question, other than Palazzolo's recollection.

Question: "This is you on the screen wearing sunglasses, correct?"

Answer (by Nieves): "Correct."

Question: "Who — you recognize that officer to your — to your right, our left as we're looking at it?"

Answer: "Oh, my Lord. No, I don't."

Question: "Do you know — do you know the officer that — that struck Mr. Stein there?"

Answer: "No, I do not."

Question: "Did you see — did you see that strike occur? Mr. — Mr. Stein is the camera man, by the way?"

Answer: ". . . No, I did not."

Question: ". . . Did — did you see who — who struck or pushed Mr. Coogan?"

Answer: "No, I did not."

Nieves also was shown other numbered groups of video clips and answered questions about their contents in connection with other uses of force by him and other officers.

In 2008, Nieves was charged with three counts of misconduct arising from Nieves's actions in the park. The first two counts charged Nieves with using unauthorized force. Count 3 was for "provid[ing] misleading statements during an official Department investigation, pertaining to the identity of a fellow Metro officer(s) involved in the May 1, 2007 MacArthur Park incident." Count 3 was based on the statements set forth above and Nieves's failure to identify Blizzard when viewing portions of the three video clips identified as "Number 6. Coogan and Stein."

In May 2009, a Board of Rights heard testimony, viewed videos, received other evidence, and found Nieves guilty on all counts. Nieves filed a petition for a writ of mandate in the superior court. In 2010, Judge David Yaffe found the first two counts for unauthorized use of force were supported by the weight of the evidence. They are not the subject of this appeal. The court concluded, however, there was insufficient evidence to support the Board's finding that Nieves made misleading statements about "Number 6. Coogan and Stein." Judge Yaffe ordered the City to set aside the decision as to count 3 and take further action consistent with his ruling. Judge Yaffe entered judgment, which subsequently was affirmed on appeal. (*Nieves v. City of Los Angeles* (Jan. 18, 2012, B228817) [nonpub. opn.].)

Pursuant to Judge Yaffe's order, the same Board members reconvened and reexamined the evidence. The Board printed and examined screen captures of single frames of the video clips. These were created after Nieves's Internal Affairs interview and were never shown to him. The Board emphasized how painstaking its work had

been, consisting of many hours of deliberation and minute frame by frame inspection of the videos and other evidence, calculated to determine the identities of various officers depicted in the videos.

The City appears to contend these screen captures replicate what Nieves could see when the video was paused on a single frame. One of the newly created screen captures, Board exhibit 1A, shows an officer wearing sunglasses under his visor (identified by Nieves at the Internal Affairs interview as himself), standing to the left of another officer who wears a large visor, partially raised, showing part of his nose and the bottom of his face. Blizzard subsequently identified himself as the officer with the large visor, partially raised.

The screen capture marked Board exhibit 1C appears to depict the same location. It depicts an officer. If he wears sunglasses under his visor, they are not readily detectible. That officer stands to the left of a blur of motion that may sprout a black-gloved hand (or two), consistent with police gear. The Board interpreted this as follows: "Blizzard can be seen stepping into and making contact with Stein and Nieves [on his left] reacts."

Board exhibit 2A is another screen capture which appears to depict the same time and place in the park. Two officers are shown cheek to jowl. The one on the right wears a large visor, which may not be fully lowered. A blurry object, which on close inspection is a video camera, appears in front of the officer on the right with the large visor. The faces of the officers are not visible because of sunlight reflecting off the visors. The Board concluded exhibit 2A captured Blizzard making contact with Stein, with Nieves at his left elbow, looking in the direction of what was happening.

Board exhibits 2B through 2F are hard to decipher and blurry, but piecing them together, they may depict the cameraman or his camera on the ground in the same location depicted in the previously described screen captures, with an officer nearby looking at what is on the ground. The officer's face is hidden by a visor and sunlight reflected on it. The screen captures are not inconsistent with the officer being Nieves

looking at the camera and cameraman on the ground. Other screen captures appear to depict different events and locations not shown in "Number 6. Coogan and Stein."

The supplementary text added by the Board to its rationale focused on the Board's determination that Nieves was not credible when he viewed and commented on videotapes of incidents, including video clips not included in "Number 6. Coogan and Stein." Nieves had been shown videotapes of himself concerning counts 1 and 2, which alleged Nieves had used unauthorized force himself in the park. The Board pointed to Nieves's "testimony and lack of recollection of his use of force in Count No. 1," where the Board said Nieves first denied he struck a man, and "[o]nly after the compelling testimony of Lieutenant Palazzolo [at the Board of Rights hearing] did Officer Nieves admit that he was the officer seen using the force on the videotape in Count 1." Another incident that made the Board doubt Nieves's credibility was that Nieves purportedly "could not identify himself using force in Count 1 . . . . He did not admit to his involvement in that use of force until the evidence indicated his involvement was overwhelming."[1]

In addition, the Board referenced a videotape identified as "Incident 13, Clip 1." The Board concluded it shows Nieves standing near Blizzard, when Blizzard strikes cameraman Stein violently. The Board wrote, Nieves "clearly reacts to Blizzard's actions. This evidence clearly depicts a significant use of force right in front of Nieves and it is unreasonable to believe that he did not witness it."

The Board determined, "[T]he videotaped evidence in conjunction with Officer Nieves's testimony clearly establishes beyond, not just a preponderance of evidence, but of a reasonable doubt that Officer Nieves was misleading during the MacArthur Park investigation." The Board saw the live testimony of witnesses, including Nieves, which gave it the ability to assess his credibility. "[I]t was unreasonable for Officer Nieves not

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[1] Nieves points out, however, that Palazzolo, to whom Nieves made these statements, opined these statements by Nieves were actually credible.

to be able to identify Officer Blizzard when he was shown the Coogan/Stein video, Board exhibit 1A."

The Board again found Nieves guilty of making misleading statements pursuant to count 3 and recommended to the chief of police that count 3 be reinstated. The chief of police adopted the recommendation in December 2010, count 3 was reinstated, and, as a result, Nieves was suspended for 20 days. This was the same penalty that had been imposed when Nieves originally was found guilty of counts 1, 2, and 3.

On March 1, 2011, Nieves filed another petition for a writ of mandate, challenging the Board's findings as to count 3. Judge Lavin held a hearing, received the entire administrative record into evidence, watched the relevant video clips, and took the matter under submission. There is ample evidence that Judge Lavin fully reviewed the record.

Thereafter, Judge Lavin granted Nieves's petition, issuing the requested writ and entering judgment for Nieves. The court's order stated in pertinent part: "The Court appreciates that, on remand, the Board of Rights made additional findings concerning Petitioner's credibility. However, the Court's review of Nieves' interview on June 26, 2007 establishes that he was candid and straightforward in his testimony; he was not evasive and did not hesitate before responding. (See AR 1681 - 1687). Indeed, he identified many of the officers in the video clips that were shown to him on that day, including some who were involved in the use of force." The court explained it did not accept Palazzolo's testimony before the Board that he remembered he had stopped the video clips at a specific frame or frames and that Nieves's answers were given when these specific frames were being displayed to him. The court disbelieved Palazzolo because two years had passed between the June 26, 2007 Internal Affairs interview and Palazzolo's May 2009 testimony before the Board and because Palazzolo had conducted 50 interviews arising from the May Day incident. In addition, "Quite simply, based on the chaotic nature of the incident, and the brevity of the video clips shown to [Nieves], the Court agrees with Judge Yaffe that substantial evidence does not support a finding of misconduct." Judgment was entered for Nieves, and this timely appeal followed.

DISCUSSION

1. *Governing law*

"Where . . . a case involves a police officer's vested property interest in his employment, the trial court is required to exercise its independent judgment. [Citation.]" (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658 (*Barber*).) In such a case, the trial court is required to determine whether the weight of the evidence supports the administrative agency's findings. (Code Civ. Proc., § 1094.5, subd. (c); *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32 (*Strumsky*).)

There is, however, a limitation on the trial court's exercise of its independent judgment. Reversing a Court of Appeal decision that suggested "agency determinations and findings would be entitled to no weight at all," our Supreme Court held in *Fukuda v. City of Angels* (1999) 20 Cal.4th 805 (*Fukuda*) that "[i]n exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda*, at p. 817.) The court explained "the presumption provides the trial court with a starting point for review—but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." (*Id.* at p. 818.) An agency determination may be disturbed by the trial court if the petitioner shows an abuse of discretion. (*Id.* at p. 814.)

Consistent with *Fukuda*, this Division held in *Barber*, "[A]n exercise of independent judgment *does* permit (indeed, it requires) the trial court to reweigh the evidence by examining the credibility of witnesses." (*Barber, supra*, 45 Cal.App.4th at p. 658.) "[I]n exercising its independent judgment 'the trial court has the power and responsibility to weigh the evidence at the administrative hearing *and to make its own determination of the credibility of witnesses*.' [Citation.]" (*Ibid.*)

In 1968, the Court of Appeal in *Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179 had posited a different theory: "[A]lthough the superior court reviews the administrative record to see where the weight of the evidence lies, the credibility of witnesses is for the determination of the [administrative agency]." (*Id.* at p. 188.) However, *Arenstein* was decided six years before our Supreme Court's decision in *Strumsky*, *supra*, 11 Cal.3d 28, and more than 30 years before our Supreme Court's decision in *Fukuda*, *supra*, 20 Cal.4th 805. In *Barber*, we rejected *Arenstein's* conclusion that the credibility of witnesses is for determination by the administrative agency and noted *Arenstein*'s approach had been rejected in a long line of cases decided after *Strumsky*. (*Barber*, *supra*, 45 Cal.App.4th at p. 658 & fn. 5.) Indeed, *Arenstein*'s approach was again rejected recently in *Alberda v. Board of Retirement of Fresno County Employees' Retirement Assn.* (2013) 214 Cal.App.4th 426, 433 (trial court may disagree with administrative agency as to credibility of witnesses).

In *Guymon*, this Division specifically declined to follow *Arenstein*, in part because the rights generally affected by administrative agencies that are subject to independent review by the courts are so important that "California fixes responsibility for factual determination at the trial court rather than the administrative agency tier of the pyramid as a matter of public policy." (*Guymon*, *supra*, 55 Cal.App.3d at p. 1015; *id.* at p. 1016; see also *Hankla v. Long Beach Civil Service Com*. (1995) 34 Cal.App.4th 1216, 1222 [the "purpose of the writ of mandamus procedure is not to rubber-stamp every administrative decision that is rendered"]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1995) § 8:127 et seq., pp. 8-44 to 8-45 [the theory is that abrogation of a fundamental vested right "'is too important to the individual to relegate it to exclusive administrative extinction'"].)[2]

"[T]he standard of review on appeal of the trial court's determination is the substantial evidence test." (*Fukuda*, *supra*, 20 Cal.4th at p. 824.) Appellate review "is

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[2] Contrary to the City's assertion, the reasoning of *Guymon* is not limited in application to cases where the administrative agency did not hear live testimony. (*Guymon*, *supra*, 55 Cal.App.3d at pp. 1015–1016.)

limited to a determination whether substantial evidence supports the trial court's conclusions and, in making that determination, [appellate courts] must resolve all conflicts and indulge all reasonable inferences in favor of the party who prevailed in the trial court. (*County of Alameda* v. *Board of Retirement* (1988) 46 Cal.3d 902, 910; *Bixby* v. *Pierno* [(1971)] 4 Cal.3d [130,] 143, fn. 10; *Pasadena Unified Sch. Dist.* v. *Commission on Professional Competence* (1977) 20 Cal.3d 309, 314.)" (*Barber*, *supra*, 45 Cal.App.4th at pp. 659–660.)

2. *We find no evidence the trial court failed to apply the requisite strong presumption of correctness to the Board's findings when the trial court determined the weight of the evidence favored Nieves's position; substantial evidence supports the trial court's decision*

The City argues the trial court failed to apply the requisite strong presumption of correctness to the Board's findings, arguing that the "substantive reasoning" in the court's five-page minute order consisted of only 13 lines, in which the court improperly disagreed with the Board concerning Nieves's credibility.

The City makes no argument as to the thoroughness of the trial court's review of the entire administrative record, including a transcripts of Internal Affairs interviews of Nieves and others, transcripts of the Board's proceedings, video clips and screen captures, all of which were received in evidence. Indeed, the record establishes the court fulfilled its duty to review the record.

The City complains that the judge gave the Board's decision "short shrift" because his written analysis was short. To echo the sentiments of Blaise Pascal, the brevity of the trial court's order is more indicative of the court's careful analysis than a longer order might have been.

Despite its brevity, the trial court's analysis recognizes explicitly or implicitly the following evidence and reasonable inferences therefrom: (1) the scene of the demonstration was so chaotic and stressful, and Nieves was so busy multi-tasking and looking in all directions, that Nieves might not have seen what the Board thinks Nieves saw during the demonstration; (2) even if Nieves was facing in Blizzard's direction or

near him when Blizzard engaged in unjustifiable uses of force during the demonstration, these impressions might not have registered with Nieves due to stress and sensory overload; (3) even if Blizzard's conduct registered with Nieves during the demonstration, Nieves might not have recognized the events when viewing the video clips because the clips were so short, fast, blurred and difficult to decipher, even when paused on single frames; (4) the video clips (and even the screen captures taken from the videos) did not show things as clearly as the Board claimed; (5) Nieves could not be expected to recall which of a hundred officers wore his visor partially raised at any particular moment and which officers possessed larger visors than others; (6) the "Number 6. Coogan and Stein" video clips did not show Blizzard's name on his back or serial number on his helmet in any of the shots of use of force, and Nieves could not be expected to recall the multi-digit serial numbers of his colleagues anyway; (7) the "Number 6. Coogan and Stein" video clips did not show distinctive features of the officers that someone like Nieves, who had not spent many hours watching them, would be expected to notice during his short exposure to them during his interview; (8) after reviewing numerous video tapes and conducting 50 interviews, it is questionable whether Palazzolo could have remembered what frames Nieves was looking at when he made the challenged statements so that there was no reliable record of what his statements responded to; (9) unlike Nieves, the Board and Palazzolo had spent so much time pouring over numerous video clips and screen captures, identifying officers by distinctive accoutrements and considering information they provided in interviews, they might not have been sufficiently objective in assessing Nieves's inability to understand the videotapes as well as they did; (10) in the transcript of Nieves's Internal Affairs interview, Nieves appeared candid and straightforward, not evasive, and did not hesitate in responding; and (11) contrary to the Board's apparent belief that Nieves was shielding himself and officers who had used unnecessary force in the park, the interview transcripts showed Nieves actually had identified officers who used unnecessary force and had readily identified himself.

Assuming the trial court started its analysis by according the Board's decisions the strong presumption of correctness to which they were entitled, the foregoing evidence and reasonable inferences drawn therefrom easily could have overcome the rebuttable presumption, leading the court to conclude the weight of the evidence favored Nieves. There simply is no evidence that suggests this did not happen. The City's argument is simply that the brevity of the court's order and its disagreement with the Board's credibility determinations establish, a fortiori, that the court did not start with the prescribed presumption. The City cites no authority requiring the trial court spontaneously to prepare a full-blown statement of decision under these circumstances, and the law is to the contrary. (Code Civ. Proc., § 632.) Moreover, if the court's disagreement with the Board's credibility determinations were sufficient to show a failure to accord the proper deference to the Board's decision, independent review would be but an illusion.

The evidence and reasonable inferences drawn therefrom establish the trial court's decision that the weight of the evidence favored Nieves's position was based on substantial evidence.

In light of the foregoing, we need not address the balance of the parties' arguments.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MILLER, J.*

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, § 6 of the California Constitution.